**ALOES EXECUTIVE CARS (PTY) LTD v MOTORLAND (PTY) LTD AND ANOTHER 1990 (4) SA 587 (T)**

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| Citation | 1990 (4) SA 587 (T) |
| Court | Transvaal Provincial Division |
| Judge | VAN DIJKHORST J |
| Heard | August 10, 1990 |
| Judgment | August 10, 1990 |
| Annotations | |

**Flynote : Sleutelwoorde**

Costs - Counsel's fees - Consultations for and drawing of opposing affidavits - Not function of counsel to draft affidavits and prudent attorney would refer petition, application or affidavits drafted by himself to counsel for settling - Counsel's fees for 20 hours of consultations and drafting and final settling of affidavits opposing vindicatory proceedings reduced in review of taxation fee to fees for three hours of consultation and two hours of settling.

Costs - Counsel's fees - Counsel representing more than one respondent - Counsel not entitled to charge double his normal fee merely because there are two respondents with separate defences - Although matter may become more complex by virtue of there being more than one respondent this not necessarily so.

Costs - Counsel's fees - Generally - Fees of counsel on opposed motion in Transvaal Provincial Division - Current yardstick adopted for juniors from R900 to R2 800 and seniors from R2 200 to R7000 on opposed motion and for the first day of trial, inclusive of preparation and heads of argument if applicable.

Costs - Party and party - Attorney's fees - For consultation with client when signing affidavit - Making of affidavit not to be taken lightly - Reasonable and often imperative that lay clients have their affidavits explained to them - No prohibition in items E4 (a) or A6 or D7 of tariff in Rule 70 of the Uniform Rules against allowing such fee.

**Headnote : Kopnota**

In a review of taxation of a bill of costs arising from opposed vindicatory proceedings the Court made a number of orders:

(1) As to counsel's fees for consultations for and the drawing of respondents' opposing affidavits, the Court remarked that it was not the function of counsel to draft affidavits. The prudent attorney would refer a petition, application or affidavits which he had himself drafted to counsel for settling. In the instant case counsel (a senior junior) had charged R3 600 for 20 hours of consultation and R2 500 for drafting and final settling. The Court held that the number of hours spent was excessive and allowed a fee of R540 for consultation and R360 for settling.

(2) As to counsel's fees for representing more than one respondent it appeared that the Taxing Master had allowed a fee of R5000 for counsel's appearance at the hearing which was twice what it would have been had there been only one respondent. The Court held that merely because there were two respondents with separate defences did not mean that counsel was entitled to charge double his fee. Although the matter could thereby become more complex this was not necessarily so.

(3) As to counsel's fees generally the Court remarked, after consulting recently appointed Brethren, that it appeared that the current range of fees for junior counsel at the Pretoria Bar was R900 to R2 800 and senior counsel R2 200 to R7000 on opposed motion and for the first day on trial inclusive of C preparation and heads of argument if applicable. In applying this yardstick to the present matter and allowing for the fact that the matter was heard in April 1989 an amount of R1 600 was to be allowed for counsel's fee for the hearing.

(4) As to the question whether a fee should be allowed to the attorney for consultations with his clients when they signed affidavits the Court held that the making of an affidavit was not to be taken lightly and the consequences of false statements could be serious. It was reasonable and often imperative that lay clients have the contents of their affidavits explained to them. There was no prohibition in items E4(a) or A6 or D7 of the tariff in Rule 70 of the Uniform Rules of Court against allowing such fee.

**Case Information**
**Review of taxation.**

**Judgment**
Van Dijkhorst J: This is a review of taxation in terms of Supreme Court Rule 48. It deals with the reasonableness of consultations with counsel and the drafting by him of affidavits, counsel's fees, the interpretation and applicability of item E4(a) of the tariff of attorneys' fees in Rule 70 of the *Uniform Rules of Court* and the reasonableness of certain attorneys' charges.

The applicant, having first successfully ex parte obtained an urgent vindicatory order on application, lost after the matter was opposed and the second respondent was joined. The applicant, who had handed a valuable Mercedes Benz to the first respondent, sought to vindicate it first from the first respondent and later from the second respondent to whom the first respondent had sold and delivered it. The agreement in terms of which the motor vehicle had been handed over to the first respondent was in issue; the first respondent alleged it was an unconditional sale while the applicant alleged a suspensive condition. The first respondent's defences were that it had bought the vehicle and that it was in any event not in possession thereof. The second respondent relied on the rights the first respondent had in the vehicle and pleaded estoppel.

When the matter eventually came to Court as an opposed motion the learned Judge made short shrift of it, holding that there was a real dispute of fact on the papers and that this had been foreseeable when I the matter was initiated. He dismissed the application with costs and also a later application for leave to appeal.

The respondents' bills of costs of the application and application for leave to appeal were taxed and certain decisions of the Taxing Master are brought on review.

In terms of *Supreme Court Rule* 70(3) the aim of taxation of costs as between party and party is to indemnify fully the successful party for all costs reasonably incurred by him. The starting-point is therefore that the successful litigant should not be left out of pocket unless the costs, charges and expenses were not necessary or proper in the context of that litigation. Expressly excluded are costs caused by overcaution, negligence or mistake or special fees or charges of counsel or witnesses, but these are not the only items which may be unnecessary or improper.

The Taxing Master has a wide discretion to determine which costs are reasonable and which not and it should be borne in mind that by reason of his experience he has a much wider knowledge of current fees and charges than a Court may have. Yet when it comes to deciding whether consultations with counsel or the drafting of affidavits by counsel was necessary or reasonable then the Judge by reason of his long experience as an advocate is in a far better position than the Taxing Master. This consideration also applies when a question arises on the practice of marking of fees by counsel or when the complexity of the case has to be gauged.

1. The first question to be answered is whether the respondents' attorney was justified in briefing counsel on consultations for and drawing of the answering affidavits of the respondents and their witnesses. *Jacobs and Ehlers Law of Attorneys Costs and Taxation Thereof* at 161 para 208 state that:

'Charges for consultation with counsel on an application should not be allowed as between party and party except where the application is not of an interlocutory nature and involves a large number of facts from which it is necessary to make a selection.'

I would slightly extend and rewrite this guide-line positively as follows: Attorney's charges for consultation with counsel on an application and counsel's fees in respect thereof should be allowed as between party and party on taxation when the matter is involved where the facts or law or both are concerned. To determine the complexity of the issues it may not always be a sound guide to look at the end result, ie the final affidavit or even the judgment, as by that time difficult decisions may have been made and complex matters distilled to simple ones. The test is: Was it reasonable to approach counsel for his advice in the then prevailing circumstances?

Applying this test, the respondents and their attorney acted reasonably in approaching counsel for advice upon their course of action. These consultations did, however, not stop at advice in general on the course to be plotted. These were in-depth consultations by counsel with the clients to enable him to draft the answering affidavits. This was unnecessary.

*Jacobs and Ehlers* (op cit at 160 para 207) state that 'fees to counsel for the actual drawing of a petition (application or affidavit) will be allowed, as between party and party, only in very difficult and complicated matters'. As authority for this statement the authors refer to *Ex parte MacRobert and De Villiers* 1934 TPD 320 which does not support it. It deals with an attorney and client bill and lays down an entirely different principle.

Nevertheless what is stated by the authors has been for decades and still is the guiding principle of Taxing Masters. And rightly so. It is not the function of counsel to draft affidavits. That is work which is normally done by attorneys. Hence the rule that only in very difficult and very complicated matters will it be reasonable to clothe counsel with the mantle of draftsman of affidavits. It may well be that some attorneys have through lack of skill or confidence and more frequently because they have other pressing business, relegated themselves to the status of carrier of briefs and that some counsel have for pecuniary reasons cast themselves in the role of draftsman, laboriously sifting evidence in consultation upon consultation and painstakingly compiling voluminous affidavits. This is, however, not the general practice of the professions and if some of their members act in that way they do so at their peril as far as costs are concerned. It is a luxury in which they cannot indulge at the expense of the unsuccessful litigant.

A distinction should be drawn between drafting of affidavits and the settling thereof. A prudent attorney may often decide to refer the petition, application or affidavits drafted by himself to counsel for settling. Two legal minds are better than one. Counsel who is not closely involved with the client may scrutinise them with a more objective eye and may in the particular field be more experienced than his instructing attorney.

The test whether it is reasonable to brief counsel on settling affidavits etc is not as stringent as in the case of drafting by counsel. In those cases where it is reasonable to consult counsel on the cause of action or defence it would also be reasonable to brief him to settle the affidavits. That is in cases where there are involved legal or factual issues.

This matter, though to a certain extent out of the ordinary, was not very difficult or very complex. Consultations with counsel for the purpose of drafting affidavits were uncalled for. So was drafting itself by counsel.

On the other hand the affidavits show that the issues were not simple. In my view a prudent attorney would in these circumstances consult counsel for guidance and having drafted the affidavits himself brief counsel on settling thereof. The consultations could not have lasted more than three hours and the settling two hours.

Counsel charged R6 100 for consultations, drafting and final settling. The consultations lasted 20 hours, for which he charged R180 per hour, viz R3 600. For drafting (including final settling) he charged R2 500. (Of the R3 600 an amount of R720 representing four hours was taxed off.)

In my view the number of hours spent in consultations about this matter is exorbitant. Even half would be excessive. The charge of R180 per hour is not in dispute and I express no opinion thereon. I apply it in arriving at a reasonable fee. Counsel's fees have to be reduced to R540 for consultation and R360 for settling. Item 4 on p 11 of the bill of costs is to be reduced accordingly.

It follows from the above that the attorney's fees for attendances on counsel set out in item 9 on p 2, item 11 on p 6 and item 2 on p 7 of the bill of costs will have to be reduced or taxed off. On the other hand the Taxing Master should allow the attorney a fee as if he had drawn the affidavits himself.

2. Was counsel's fee for the application excessive?

Counsel charged R5000. The matter could not have lasted very long. As the issues and facts would have been indelibly imprinted on counsel's memory after these long consultations and drafting sessions not much preparation was called for. As I have disallowed these consultations I will approach the fee on hearing on the basis that counsel was briefed as he should have been and would have had to prepare accordingly.

As it turned out the matter was disposed of by the Court on the basis that there was a foreseeable dispute of fact which could not be resolved on the papers and the rule was discharged. Any counsel would at a glance have seen from the affidavits that this matter could never get off the ground. The legal principles involved were *rei vindicatio* and estoppel. The factual issue was whether an agreement had been concluded. Not much preparation was needed even had this matter been heard on the merits.

In a note on the brief (for taxation purposes) counsel stated that the matter was involved. There were different grounds of defence for each respondent and separate heads of argument were prepared and handed in. I have perused these heads of argument. Those for the first respondent set out trite law in respect of the *rei vindicatio* and after submitting that this respondent was wrongly joined deals with costs. The heads of argument for the second respondent in the main raised the point that final relief can be granted on the papers and deal with estoppel and the question whether there is a genuine dispute of fact.

There was no involved legal issue at stake. The facts were, though not simple, also not unduly complicated. Counsel was a senior junior.

The fee was excessive - even on an attorney and client basis, and more so on a party and party basis.

The Taxing Master seeks to justify the fee on the basis that it is R2 500 per client, as there were two respondents who briefed the same counsel. Reliance is placed on *Jacobs and Ehlers* (op cit at 80 para 76) where the following statement is made:

'The fact that the same counsel is briefed by different defendants, who would have been entitled to separate counsel, and who are being sued by the same plaintiff, is irrelevant for the purpose of taxing counsel's fees, which will be taxed as if separate counsel were briefed for each defendant.'

The authors quote in support *Malan v Witbank Colliery Ltd 1911 TPD 123* and *Bartholomew v Stephens and Edwards* 5 M & W 386. *Malan's* case is clearly distinguishable from the present one. In that case two defendants had been sued. Each defendant had a separate attorney and each briefed a separate junior counsel, but both were led by the same senior counsel. One defendant was successful and the other not. In taxing the bill of costs for the successful defendant against the plaintiff the Taxing Master had allowed the fees of attorney and junior counsel in full but reduced the 35 guineas (and refresher 25 guineas) of the senior to 20 guineas (and refresher 10 guineas) as he considered the work done in respect of each brief to be substantially the same. Bristowe J held that as senior counsel had received a brief from each defendant the fees on that brief were part of the separate costs of that defendant and as the fees were in themselves not unreasonable they should stand. The fact that the other defendant had also briefed the same senior counsel was held to be irrelevant. The learned Judge stated at 125:

'There is, however, another principle which it is necessary to consider. It has been often held that, where two defendants appear by the same attorney or the same counsel and one succeeds and the other J fails, the successful defendant is prima facie entitled (subject of course to all reductions proper to be made on a party and party taxation) to all his separate costs and an aliquot proportion of the joint costs, so that, if counsel received one brief for both defendants, the successful defendant would ordinarily be allowed one half of the fee. (See *Bartholomew v Stephens and Edwards* 5 M & W 386.)'

From the latter case (also reported in 151 ER 163) I quote the headnote:

'Where two defendants in trespass appear by different attorneys, but are defended by one counsel only, and one obtains a verdict and the other is found guilty, the former will be entitled to a moiety only of the costs of the brief, counsel's fees etc.'

This case therefore also does not support the proposition of *Jacobs and Ehlers*.

A case which is not referred to but which is applicable is *Jooste v Transvaalse Provinsiale Administrasie en 'n Ander* 1960 (3) SA 316 (T). It was there held that where two defendants or plaintiffs utilise the services of the same attorney each is entitled to be compensated for his own separate costs and a portion of the joint costs.

The Taxing Master therefore erred in approaching the matter on the basis that counsel was entitled to charge double his normal fee as there were two respondents with (to a large extent) separate defences. That a matter may become more complex where this is the case is obvious, but it is not necessarily so and would in any event rarely, if ever, justify double the normal fee. There is, after all, but one appearance.

I am informed by the Taxing Master that the fees for Motion Court appearance and first day of trial allowed on taxation range from R900 to R2 800 for juniors and R2 200 to R7000 for seniors, the fee allowed being dependent on the difficulty of the case.

The Taxing Master in her assessment of the fee erred in two respects. She applied a wrong principle in respect of the briefing by two respondents of the same counsel and she over-estimated the difficulty of the case. One has a lot of sympathy with Taxing Masters who on the latter aspect have to a large extent to rely on hearsay.

Counsel's fee for arguing the application (which of course includes remuneration for preparation and heads of argument) is excessive for reasons set out above.

In *Reef Lefebvre (Pty) Ltd v SA Railways and Harbours* 1978 (4) SA 961 (W) Coetzee J on the basis of an extrapolation of fees current during his own years at the Bar found that on trial and opposed application the fees for seniors would range from R750 to R1 500. For juniors that would be R500 to

R1000. He arrived at these figures by having regard to econometric information on the declining value of the rand.

On this foundation Goldstone J built when he, as at February 1985, determined that the range of R750 to R1 500 had then become R2 200 to R4 400. See *Robbertze v AA Mutual Insurance Association Ltd and Another* case No 16843/84 WLD unreported. (Applying the consumer price index to the given facts, however, renders a range of approximately R1 850 to R3 700.)

I have ascertained by the same method and using the consumer price index that the notional rand of 1978 had fallen to 22,3 cents in April 1989 when the fees I am concerned with were charged. That would increase the parameters of Coetzee J to approximately R3 350 to R6 750 for seniors and approximately R2 250 to R4 500 for juniors.

This whole exercise hinges, of course, on the fees of Coetzee J during his professional life at the Johannesburg Bar. The fees I am concerned with are those of Pretoria counsel. I can do the same exercise in relation to my own old fee books which I still have available. I decline to do so, however. With due respect to the learned Judges I think that the method applied is incorrect. Not only does it introduce a subjective element, the Judge's own antiquated fees, into the exercise, but it also opens the door for intense debate on whether that Judge was a high or low-priced silk and whether his fees were reasonable. Furthermore it would be absurd to tell the doctor, plumber or butcher that his charges are unreasonable in the light of his tariff of 20 years ago adjusted by the consumer price index. The same reasoning applies in the case of counsel's fees.

If the fees of 20 years ago were then charged by the profession because they were regarded as reasonable remuneration for the work done (which was the test), then there is no reason why one should not use as a starting-point the fees currently charged by the profession (as reasonableness is still the test). Unless it can be concluded that the profession no longer adheres to its own rule that fees must be a reasonable remuneration for work done and that it is an honourable profession and not a money-making business, the customary charges by counsel generally for similar services must be the yardstick.

And here comes the rub. It has on occasion been said that a significant portion of the Bar pays lip-service to the rule and overestimates the value of their services, without intervention by the Bar Council, thus setting a standard which is not firmly founded on reasonableness. Should this be the case, what should be a yardstick becomes a broken reed. I would like to believe that this is not the case.

Obviously such a view can only be based on intermittent contact with the subject of exorbitant counsel's fees, and what is supposed to be the tip of an iceberg may well turn out to be merely a drifting floe.

One is, however, tempted to conclude that Coetzee J in the *Lefebvre* case adopted the method followed by him and not the obvious one because of a deep-rooted distrust with the current fee structure.

I will use the current fees as a yardstick. I have no better one. In view of the time which has elapsed since my appointment to the Bench I am totally out of touch with the ruling fees. This necessitated an enquiry among my Brethren who were appointed recently. I consulted five and on the basis of their information concluded that the range of fees for juniors is well below the extrapolated fees of Coetzee J and is in line with the current range applied by the Taxing Master of the Transvaal Provincial Division, namely juniors from R900 to R2 800 and seniors from R2 200 to R7000 on opposed motion and for the first day on trial (inclusive of preparation and heads of argument if applicable). The lower end of R900 might even be dropped to R600 according to some sources.

This is the yardstick which I will apply. I will have regard to the fact that the fee is to be determined as at April 1989. I asses it at R1 600. (Had I to assess it at today's date I would have granted R1 800.)

Counsel's fee on the application is reduced to R1 600. Item 9 on p 15 of the bill of costs is to be reduced accordingly.

3. There is also an objection to counsel's fees for appearance to oppose the application for leave to appeal. He charged R2000.

The Taxing Master justifies this fee by the statement that

'(t)he Taxing Masters of this Division usually allow two-thirds of the fee charged by the advocate for the first day's hearing of the actual matter, on an application for leave to appeal'.

Should this approach be correct this fee would in any event have to be reduced. This practice does, however, not appear to me to be correct. Generally speaking an application for leave to appeal entails minimal preparation on the part of counsel when it is compared with the main application itself. If judgment is given ex tempore counsel are aware of the Court's reasoning and how it differs from their argument. Thereafter no real study of the judgment is required nor much preparation of argument. When the main case and the application for leave to appeal are heard on the same day little of counsel's precious time is lost and no additional fee is charged. If a separate day is allocated for the hearing a fee would be called for. It is erroneous to apply a general rule as set out. If the hearing is on a separate day as was the case here I would hesitate to allow more than one-half of such fee even in cases of extreme difficulty.

Counsel's fee for appearance at the application for leave to appeal is excessive and is reduced to R750. (This assessment is as at April 1989. As at today I would have determined it at R900.) Item 6 on p 5 of the second bill of costs is to be reduced accordingly.

4. Should a fee be allowed to the attorney for consultations with clients when they sign affidavits?

This was allowed by the Taxing Master but is objected to on the authority of *Van der Walt v Geyser* 1978 (2) SA 1 (T) at 8. The Taxing Master states that these fees

'are not allowed by the Taxing Masters in the Witwatersrand Local Division. But the practice in the Transvaal Provincial Division is to allow a fee of R20 to the attorney to discuss the contents of an affidavit with his client or the person whom the affidavit belongs to and a fee of R4 for the signing and perusing of the adjurat before the commissioner of oaths.'

The reason is given that the deponent is usually a layman without legal experience who must understand that he affirms under oath.

I agree with the reasoning of the Taxing Master. The making of an affidavit is not to be taken lightly and the consequences of false statements can be serious. It is reasonable and often may be imperative that lay clients have the contents of their affidavits explained to them. The more so as it is common practice to admit or deny allegations in the opponent's affidavits by reference to paragraph numbers and without repetition thereof.

I The decision in *Van der Walt v Geyser* (supra ) was that a consultation fee with the deponent of an affidavit should not be allowed in terms of tariff item E4(a) in a party and party bill of costs where an attorney has claimed remuneration in terms of tariff items A6 and D7 for instructions and the drafting of the affidavit, except where it is unusually complicated or technical. One aspect should immediately be mentioned. The deponent in that case was an attorney (who would not need an explanation). The learned Judge does not deal with the consideration that an attorney's time is taken up by the explanation of the affidavit and that as somebody has to pay for this reasonable service, on general principles it should be included in the party and party bill. It is implicit in the ruling of the learned Judge that remuneration for this service is under either item A6 or item D7. I respectfully disagree. The work cannot be 'taking instructions to draft' even in the wide sense in which the term taking instructions is used. This is one or more consultations to enable the attorney to draft the petition or affidavits. Of necessity they precede the final product of the attorney's draftsmanship. The consultation to explain the final product cannot be 'drafting and drawing' and can therefore not fall under item D7.

I do not find a prohibition in item E4(a) (or in items A6 or D7) against the allowance of this fee. On the contrary, item E4(a) empowers the Taxing Master to allow any consultation which he may consider necessary. If the explanation is of any substance item E4(a) is applicable. If it is merely a formal attendance, as on jurat, item C8 covers the event. To hold that item E4(a) is wholly inapplicable in these instances as was done in *Van der Walt v Geyser* (supra ) is in my view clearly wrong. The exception laid down (by application of Rule 70(5)) namely that item E4(a) is only to be applied in unusually complicated or technical matters, is an unwarranted limitation in view of the wording of this tariff item.

E The objection to items 10, 12 and 15 on p 7, item 20 on p 8 and item 6 on p 10 of the bill of costs is rejected.

5. Should items relating to attendances on and payments to the deputy sheriff, Witbank, have been disallowed?

These charges were incurred to effect compliance with a Court order. F The Taxing Master regarded them as necessary. She found that the cheapest way of handling the matter was followed. I am not prepared to interfere with this decision.

The objections to items 6, 7, 8, 9, 10 and 11 on p 14 of the bill of costs and items 9 and 10 on p 4 and items 8, 9 and 10 on p 5 of the supplementary bill of costs are dismissed.

G As the applicant has been substantially successful in these proceedings he should be allowed the costs thereof. These are fixed at R150.

Applicant's Attorneys: Block, Edelstein & Gross. Respondents' Attorneys: Berkow, Feinberg & Suliman.